

Respondent and its insurance carrier contend the Judge erred by failing (1) to either adopt or average in Dr. Morris' percentages of functional impairment and task loss in determining claimant's disability, (2) to find that claimant's post-injury wage is \$320 instead

of \$270, (3) to order the Workers Compensation Fund to reimburse them for any medical expenses they paid for either the trigger thumb or ganglion cyst problems that claimant developed.

Conversely, claimant contends the Award should be affirmed.

The issues before the Board on this appeal are:

1. What is claimant's post-injury wage for purposes of the permanent partial general disability formula?
2. What is the nature and extent of claimant's injury and disability?
3. Did the Judge err by failing to order the Workers Compensation Fund to reimburse the respondent and its insurance carrier for the medical expenses they paid for the trigger thumb and ganglion cyst?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. In April 1995, Sharon Malloy began working for Comfort Care Homes as a home manager caring for five Alzheimer patients. The job required Ms. Malloy to launder clothes, prepare meals, assist with medications, perform general housekeeping chores, and sometimes lift and move the patients about.
2. In August 1995, Ms. Malloy began experiencing symptoms in her back, neck, arms, shoulders, and hands. After first seeing several other doctors, in December 1995 she saw Dr. Harry A. Morris, who diagnosed severe bilateral carpal tunnel syndrome and recommended surgery.
3. Ms. Malloy continued working for Comfort Care until February 1, 1996, when Dr. Morris did surgery on the right wrist. In April 1996, the doctor did surgery on the left wrist. The doctor released Ms. Malloy from his care without restrictions on June 12, 1996.
4. Persuaded by Dr. Philip R. Mills' opinions, the Judge found that Ms. Malloy has a 12 percent whole body functional impairment and has lost the ability to perform 9 of 20, or 45 percent, of her former work tasks. The Board is also persuaded by Dr. Mills' opinions and adopts the Judge's functional impairment and task loss findings as its own.
5. After being released from medical care, Ms. Malloy immediately contacted Comfort Care about returning to work. After leaving numerous unanswered telephone messages, Ms. Malloy sought and found part-time jobs as a home health aide with two other companies, Superior Health Service and Independent Living Service Center for Southeast

Kansas. Although the exact date is not provided in the record, sometime later Superior Health employed Ms. Malloy on a full-time basis. Ms. Malloy has made a good faith effort to find appropriate employment.

6. According to the wage information provided as an exhibit to the regular hearing transcript, Ms. Malloy began working part-time for Independent Living on July 1, 1996, earning \$6 per hour. For the nine weeks she worked there, she earned a total of \$723.

7. According to that same wage information, Ms. Malloy began working for Superior Health in either late December 1996 or early January 1997. For the 45 weeks that are shown in the wage records, Superior paid Ms. Malloy a total of \$12,982.33 at various hourly rates ranging from \$7.50 to \$10.50 per hour.

8. The wage records also indicate that Ms. Malloy worked full-time (at least 40 hours per week) for the last six weeks shown in the exhibit. During that six week period, Superior paid her at \$7.50, \$8.50, \$8.60, and \$8.75 per hour. Averaging the gross pay for that six week period, the Appeals Board finds that Ms. Malloy's post-injury wage as a full-time employee earning various hourly wages is \$311.19.

9. In their March 5, 1998 submission letter to the Judge, Comfort Care and its insurance carrier stipulated that Ms. Malloy's pre-injury average weekly wage was \$449.94. Comparing the \$311.19 that Ms. Malloy is earning as a full-time employee of Superior Health to the \$449.94 that she was earning for Comfort Care yields a 31 percent difference in pre- and post-injury wages.

10. Ms. Malloy has failed to prove that the trigger thumb and ganglion cyst conditions she later developed are related to her work for Comfort Care. That conclusion is based upon Dr. Morris' uncontroverted testimony regarding the relationship between those conditions and the work at Comfort Care.

CONCLUSIONS OF LAW

1. The award should be modified to reduce the permanent partial general disability to 38 percent.

2. Because she has sustained permanent injury to both arms, Ms. Malloy's entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e. That statute provides:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference

between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk¹ and Copeland.² In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the injury.

3. As indicated above, Ms. Malloy has made a good faith effort to find appropriate employment. Therefore, actual pre- and post-injury wages are compared for the wage loss prong of the permanent partial disability formula. And that wage loss or difference is 31 percent.

4. Also as indicated above, Ms. Malloy has lost the ability to perform 45 percent of the work tasks that she performed in the 15-year period before her injuries developed. Averaging the 31 percent wage loss with the 45 percent task loss creates a 38 percent permanent partial general disability.

5. The Board has not determined the permanent partial general disability rating for the period that Ms. Malloy worked as a part-time worker because the Board recognizes that under these facts it would not change either the payment of the award or the total amount awarded.

6. Comfort Care and its insurance carrier request the Board to order the Workers Compensation Fund to reimburse them for the medical expenses they paid for the trigger thumb and ganglion cyst. Because the Legislature has specifically reserved for the Director the authority to determine the amount of reimbursement that should be certified to the Commissioner of Insurance as provided by K.S.A. 1998 Supp. 44-534a, the parties should direct their request for certification to the Director.

AWARD

¹ Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

² Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

WHEREFORE, the Appeals Board modifies the March 4, 1998 Award to reduce the permanent partial general disability from 41.5% to 38%.

Sharon K. Malloy is granted compensation from Comfort Care Homes for a January 31, 1996, accident and a resulting 38% permanent partial general disability. Based upon a \$449.94 average weekly wage, Ms. Malloy is entitled to receive 31 weeks of temporary total disability and 151.62 weeks of permanent partial general disability benefits at \$299.97 per week for a total award of \$54,780.52. As of April 15, 1999, Ms. Malloy is owed \$50,094.99. The remaining balance of \$4,685.53 is to be paid at the rate of \$299.97 per week until paid in full or further order of the Director

The Appeals Board adopts the remaining orders set forth in the award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John C. Nodgaard, Wichita, KS
Gregory D. Worth, Lenexa, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director